APPENDIX A

[Filed Mar. 2, 1995]

SUPREME COURT OF ARIZONA
En Banc

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE IBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Appeal from the Superior Court of Arizona
in Maricopa County
The Honorable Michael A. Yarnell, Judge

Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV-91-19192

OPINION

MARTONE, Justice.

We are asked to define the nature, scope and effect of 23 U.S.C. § 409 on the discoverability and admissibility of evidence in railroad-crossing tort claims.

I. BACKGROUND

This is a wrongful death action brought by Mary Isbell as the surviving spouse of her husband, Richard, who died in 1990, when the milk truck he was driving collided with a train at a crossing in Chandler. Among other things, Mary alleges that the crossing was unreasonably dangerous and that both Southern Pacific Railroad Com-

pany and the State of Arizona are responsible for its condition. Seven years earlier, in 1983, the state identified the crossing as one at which automatic gates ought to be installed to improve its safety. In 1986, the corporation commission authorized the installation, but by 1990, when Richard died, the gates had not been installed.

Through discovery, Mary sought information on why the automatic gates had not been installed. She wanted facts about the crossing and other crossings in the state. She wanted to know why the corporation commission concluded that the crossing should be improved. The state moved for a protective order. Isbell moved for an order compelling discovery not only from the state, but from Southern Pacific. The state and Southern Pacific argued that the information sought was neither subject to discovery nor admissible in evidence pursuant to 23 U.S.C. § 409, which provides as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for any other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The state and Southern Pacific argued that the statute exempted from discovery not only the reports, surveys, schedules, lists, or data compilations made for the purposes identified in the statute, but also all the facts in those reports even if available from other sources. Isbell

argued that if otherwise part of a federal improvement program, the statute only protected the reports themselves, and not the underlying facts. The trial court agreed with Isbell. It held that:

> While the actual 'reports, surveys, schedules, lists, or data' compilations (or calculations) prepared expressly for 'the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings' are neither discoverable nor admissible, simple factual information gathered for or contained in such reports or compilations is discoverable and is admissible *if* otherwise relevant and probative . . . . [a]n otherwise discoverable or admissible fact is not made non-discoverable or non-admissible simply by its inclusion in a privileged document or conversation.

Minute entry of December 3, 1992 at 27-28.

The trial court therefore denied the state's motion for protective order and granted Isbell's cross-motion for order compelling discovery from the state and from Southern Pacific.

The state and Southern Pacific filed petitions for special action relief in the court of appeals. That court granted relief and held that in addition to the documents described in § 409, data that ends up in those documents, from whatever source derived, even a newspaper article, are neither subject to discovery nor admissible. *Southern Pac. Transp. Co. v. Yarnell*, 176 Ariz. 552, 863 P.2d 271 (App. 1993). We granted review.

II. ANALYSIS

So far as we are aware, the history of 23 U.S.C. § 409 is nonexistent. It is thus especially important to focus on the language itself. We diagram § 409 as follows. In relevant part, it covers:

(1) reports, surveys, schedules, lists or data;

(2) compiled;

(3) for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings;

(4) pursuant to 23 U.S.C. §§ 130, 144, and 152; and

(5) a location mentioned in such reports, surveys, schedules, lists or data.

Thus broken down, it seems evident that each of these requirements must be met before the discovery and admissibility provisions become operative. If we look only to words, we agree with the trial court that the statute immunizes from discovery and admissibility the documents prepared in connection with the relevant federal safety program. This would allow those associated with the program to prepare such documents without fear that they would be produced. But the statute does not purport to protect facts within the personal knowledge of a party, unless that knowledge comes solely from the protected document. For example, a railroad may know that there were twenty such accidents at a particular crossing. Compiling this data for the safety improvement program under the statute makes the compilation itself nondiscoverable and nonadmissible. But the railroad would have to reveal that there were twenty such accidents. It would not have to reveal any report, survey, schedule, list or data compilation made in connection with the safety enhancement program. This seems to us to comport with both the express language of the statute and its spirit. Construing the statute to cover all facts that ultimately end up in such compilations, from whatever source derived, would go far beyond protecting the safety enhancement process and indeed would turn that process on its head. It would prevent the parties from proving claims that could otherwise have been proven had there been no safety enhancement project. The Su-

preme Court has held that the federal railroad safety enhancement program does not preempt state damage claims. *CSX Transp., Inc. v. Easterwood*, —— U.S. ——, 113 S. Ct. 1732 (1993). The Court said:

> [T]he scheme of negligence liability could just as easily complement these regulations by encouraging railroads—the entities arguably most familiar with crossing conditions—to provide current and complete information to the state agency responsible for determining priorities for improvement projects . . . .

—— U.S. at ——, 113 S. Ct. at 1739.

But state damage claims can only be proved with facts. The Supreme Court has acknowledged that the federal statutory scheme may peacefully coexist with the state tort scheme. In fact, they complement each other. But the breadth of exemption from discovery and admissibility argued by Southern Pacific and the state, and acknowledged by the court of appeals, would sacrifice the state tort scheme on the altar of the federal statutory scheme.

We disagree with the court of appeals' assertion that "the clear weight of authority holds that data as well as documents are protected by the statute." *See Southern Pac. Transp. Co.*, 176 Ariz. at 555, 862 P.2d at 274. So far as we know, only the United States Court of Appeals for the Eighth Circuit reads the statute so broadly as to preclude data from other sources once that data is also complied in a statutory report. *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (excluding even newspaper article); *accord Lusby v. Union Pac. R.R.*, 4 F.3d 639, 641 (8th Cir. 1993). Recently, the Tennessee Court of Appeals, relying on our court of appeals decision, adopted a similar interpretation. *See Seaton v. Johnson*, No. 01-A-01-9408-CH-00372, 1995 WL 33681, at *6 (Tenn. App., Jan. 27, 1995).

On the other hand, several courts have specifically rejected such a broad interpretation, and instead read the

statute to allow discovery of the underlying facts. *Rick v. State Dep't of Transp. and Dev.*, 630 So. 2d 1271, 1276 (La. 1994) (admitting accident reports, traffic counts and other raw data); *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) ("Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations"); *Light v. State*, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990) (the statute excludes reports, but "does not, expressly or by implication, make the information contained in such reports confidential"); *cf. Kitts v. Norfolk and W. Ry.*, 152 F.R.D. 78, 81 (S.D.W.Va. 1993) (Section 409 "does not accord protection for documents or data prepared or compiled for some entirely separate and distinct purpose, even if the contents of the same, or parts thereof, eventually become ingredients thrown into a soup kettle with a distinct flavor of safety enhancement.").

Although other cases have held that the inadmissibility of the reports extended to testimony based directly on them, they never reached the issue of the discoverability or admissibility of the underlying facts. *Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 n.9 (7th Cir. 1992) (excluding official report and testimony based upon it, but not addressing "their observations of the crossing that were not contained in the letter and report"); *Sawyer v. Illinois Cent. Gulf R.R.*, 606 So. 2d 1069, 1073 (Miss. 1992) (excluding reports and testimony as to their contents); *Claspill v. Missouri Pac. R.R.*, 793 S.W.2d 139, 140 (Mo. 1990) (excluding a list of "most dangerous railroad crossings" prepared under § 409 and testimony based on it); *cf. Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d 794, 802 (Ohio App. 1989) (excluding evidence of any accidents "which came to the attention of the defendant solely as a result of its programs operated pursuant to a federal hazard elimination

program" but ambiguous as to whether that evidence is admissible from sources apart from the statutory report).

Of the relatively few cases on point, we find the logic of those courts narrowly interpreting § 409 to be directly supported by statutory analysis. Statutes, of course, ought to be read in ways that give an integrated meaning to all their parts. 23 U.S.C. § 409 includes "reports," "surveys," "schedules," "lists," and "data," compiled "pursuant to sections 130, 144 and 152 of this Title." Section 409 uses words like "reports" and "surveys" in the same way in which those words are used in §§ 130, 144, and 152. For example, 23 U.S.C. § 130(d), requires states to conduct "a *survey* of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a *schedule* of projects for this purpose." (Emphasis added). Thus when § 409 refers to "surveys" and "schedules," it is referring specifically to those surveys and schedules prepared pursuant to 23 U.S.C. § 130(d). Similarly, 23 U.S.C. § 144(e) (a highway bridge replacement program not applicable here) requires the federal government to inventory, classify, and prioritize highway bridges and categorizes this as *"data."* (Emphasis added). And, 23 U.S.C. § 152 (hazardous roads), requires the states to *"survey"* roads, implement a *"schedule"* of projects for improvement, and submit a *"report"* to the federal government on progress being made to implement highway safety improvement projects. 23 U.S.C. § 152(a), (g) (emphasis added).

It can thus be seen that each of the categories of information described in 23 U.S.C. § 409 have their origins in the programs described in 23 U.S.C. §§ 130, 144, and 152. These are words of art. This is powerful support for the proposition that the documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§ 130, 144, and 152, and no others.

This would promote the integrity of the federal regulatory scheme without compromising the integrity of the parallel state tort system.

We thus reject a broad interpretation of 23 U.S.C. § 409 and agree with the view of those courts giving § 409 its plain meaning. It follows, therefore, that the trial judge did not err in denying the state's motion for protective order and granting Isbell's cross-motion for order compelling discovery from the state and from Southern Pacific. The record here is insufficient for us to apply our understanding of this statute to the specific materials which were the subject of the motions. We therefore vacate the opinion of the court of appeals, affirm the order of the trial court, and remand for further proceedings consistent with this opinion.

FREDERICK J. MARTONE
Justice

CONCURRING:

STANLEY G. FELDMAN
Chief Justice

JAMES MOELLER
Vice Chief Justice

ROBERT J. CORCORAN
Justice

THOMAS A. ZLAKET
Justice

APPENDIX B

[Filed Apr. 27, 1995]

SUPREME COURT OF ARIZONA
En Banc

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
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Real Parties in Interest.

Supreme Court No. CV-93-0106-PR
Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV-91-19192

SUPPLEMENTAL OPINION

MARTONE, Justice.

Southern Pacific, joined by the State of Arizona, has filed a motion for reconsideration. One point merits discussion. Southern Pacific argues that our statutory diagram, appearing at page 5 of the slip opinion, is incorrect because it does not make reference to that part of 23 U.S.C. § 409 which refers to other federally funded highway safety improvement projects. For that same reason, Southern Pacific quarrels with our statement that "the documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§ 130, 144, and 152, and no others," as appearing at page 9 of the slip opinion.

Our opinion makes it clear that we diagramed § 409 "[i]n relevant part." Slip op. at 5. This is a railroad crossing case. There was no need for us to diagram portions of the statute which had no effect on this case except as it may have been necessary to explain particular

portions of the statute. As Isbell's response makes clear, our holding applies to the entirety of § 409, whether we are talking about railroad crossings under 23 U.S.C. § 130(d), (mentioned and relevant), highway bridge replacement programs under 23 U.S.C. § 144(e) (mentioned and noted as "not applicable here"), slip op. at 9, hazardous roads under 23 U.S.C. § 152 (mentioned and not applicable here), or other highway safety programs (not mentioned and not applicable here). Our use of the words "no others," was obviously in the context of the specific three sections then under discussion, but the statute applies to the generic category of "any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds."

For all these reasons, the motions for reconsideration are denied.

FREDERICK J. MARTONE
Justice

CONCURRING:

STANLEY G. FELDMAN
Chief Justice

JAMES MOELLER
Vice Chief Justice

ROBERT J. CORCORAN
Justice

THOMAS A. ZLAKET
Justice

APPENDIX C

[Filed May 24, 1995]

SUPREME COURT OF ARIZONA

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
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HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
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Real Parties in Interest.

Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV-91-19192

ORDER

The court has before it Southern Pacific's application for a stay, Isbell's response, and Southern Pacific's reply.

In granting or denying a stay, the court considers the probability of success on the merits, the harm that would be caused the moving party in the absence of a stay, the harm that would be caused the opposing party if a stay is granted, and the public interest.

In light of this court's opinion, we weigh the probability of success on the merits as rather low. The harm that might be caused plaintiff in the absence of a stay is that the documents must be released. But given the nature of what kinds of documents these are, no real harm can come from them except within the context of the underlying tort action. That sort of harm can always be remedied on appeal in the event that the stay should have been granted. In light of the imminency of the summer recess of the Supreme Court of the United States, and the briefing schedule for petitions for writs of certiorari, it is unlikely that that court will rule on the petition until the fall

of 1995. Thus the harm associated with the delay is significant. Finally, the public interest is served by disclosure of relevant information. There is no harm to any federally funded program.

For all these reasons, Southern Pacific's application for the stay of the issuance of a mandate is DENIED.

Dated this 24th day of May, 1995.

/s/ Frederick J. Martone
FREDERICK J. MARTONE
Justice

APPENDIX D

SUPREME COURT OF ARIZONA

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
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Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
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HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent Judge,

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Real Parties in Interest.

Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV 91-19192

MANDATE REMANDING TO THE SUPERIOR COURT

TO: Superior Court of Maricopa County, Arizona, in relation to Cause No. CV 91-19192

The above entitled and numbered cause was presented in your Court and was brought before the Court of Appeals, Divison One, Nos. 1 CA-SA 93-0003 and 1 CA-SA 93-0004, in the manner prescribed by law. That Court filed its Opinion on the 27th day of May, 1993. A Petition for Review was granted by this Court on the 15th day of December, 1993.

This Court, having considered the matter, filed its Opinion on the 2nd day of March, 1995, affirming the order of the trial court entered in the above entitled cause. A Supplemental Opinion was filed on April 27, 1995.

The Opinion of the Court of Appeals is vacated and the case is remanded to the trial court.

Two Motions for Reconsideration were filed and were denied by order of this Court on the 25th day of April, 1995.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be held in this matter as shall be required to comply with the Court's Opinions (copies attached to this original Mandate).

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the Supreme Court of the State of Arizona this 2nd day of June, 1995.

/s/ Noel K. Dessaint
NOEL K. DESSAINT
Clerk

APPENDIX E

[Filed May 27, 1993]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-SA 93-0003, 1 CA-SA 93-0004
(Consolidated)

DEPARTMENT E

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
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MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent Judge,

MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Petition for Special Action
Maricopa County Superior Court
Cause No. CV 91-19192
The Honorable Michael A. Yarnell, Judge

OPINION

LANKFORD, Judge,

In this special action, the petitioner railroad seeks relief from a superior court order compelling the railroad to produce documents which it contends are privileged.

We accepted jurisdiction and granted relief by a prior order which directed the respondent court and judge to not compel the disclosure. Our order stated that an opinion would follow, and this is the promised opinion. We have jurisdiction pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 12-120.21 and the Rules of Procedure for Special Actions. Special action jurisdiction may properly be exercised in cases involving the assertion of a privilege against discovery orders. *See* Jefferson L. Lankford & Paul Ulrich (eds.), 1 ARIZONA APPELLATE HANDBOOK § 7.2.2 at 7-6 (3d ed. 1992).

The privilege claimed by the railroad rests on a federal statute. That statute, 23 U.S.C. section 409, provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be SUBJECT TO DISCOVERY OR admitted into evidence in a Federal or State court PROCEEDING or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The capitalized language was added by amendment in 1991. 23 U.S.C.A. § 409 (West Supp. 1993) (effective Dec. 18, 1991).

This discovery dispute arose in a wrongful death action filed by the real parties in interest, the survivors of Richard Isbell. In 1990, a milk truck driven by the decedent collided with a Southern Pacific train at a crossing. The wrongful death claim alleges, among other things, that the crossing signals were inadequate.

Prior to the accident, the Arizona Corporation Commission, which regulates railroads, had designated this crossing for improvement at a later indefinite date by installing automatic gates. Subsequently, Maricopa County applied for authority to install the gates. The Commission granted the authority and issued an order directing the railroad to install the gates when resources were available.[1] However, the automatic crossing gates had not yet been installed when the accident occurred.

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[1] This order is not in the record. However, at oral argument the real parties in interest and the railroad agreed that the order did not designate a specific time for installation but rather directed the railroad to install the gates when it had the available resources.

The plaintiffs sought discovery from the railroad of information regarding this and other rail crossings in Arizona. By interrogatories and requests for the production of documents, the plaintiffs requested information about delay in installing the automatic gates after the Commission had authorized them, about all other crossing upgrades in the State of Arizona during the same time period, and about Commission action regarding the crossing upgrade. Among other things, plaintiffs sought the following specific information: (1) the dates of field reviews of the crossing; (2) the cost estimates and planning and construction dates for the crossing improvement; (3) written criteria for evaluating crossings for possible automatic gates; and (4) the number and location of crossings for which authority had been issued to install automatic gates, and installation information for each such crossing.

The railroad filed a motion for protective order and the plaintiffs filed a motion to compel discovery. The superior court denied the former motion and granted the latter. In a detailed minute entry order, the court interpreted 23 U.S.C. section 409 as protecting only the "reports, surveys, schedules, lists or data" mentioned in the statute and as exposing to discovery "simple factual information gathered for or contained in such reports or compilations . . . ." "An otherwise discoverable or admissible fact," the court reasoned, "is not made non-discoverable or non-admissible simply by its inclusion in a privileged document or conversation." Consequently, the court ordered that "factual information"—but not reports, other documents, opinions or conclusions—was discoverable.

The disposition of this dispute is determined by the federal statute. Although the plaintiffs have made a state law wrongful death claim, the federal statute overrides Arizona's discovery rules by virtue of the Supremacy Clause. U.S. Const. art. VI, cl.2. We are bound to follow the federal statute.

The statute protects the information from discovery. The statutory privilege sweeps broadly indeed, but that is the rule Congress enacted. The 1991 amendment to section 409 clarified that not only is the protected data inadmissible in court, but also shall "not be subject to discovery . . . or considered for other purporses . . . ." More importantly, Congress broadly defined the scope of protected information as "reports, surveys, schedules, lists, *or data* compiled" in connection with Federal Rail and Safety Act (45 U.S.C. sections 421-447) and Federal Highway Safety Act (23 U.S.C. sections 101-160) programs. (Emphasis added). These federal safety programs include surveys and programs conducted by the states pursuant to federal highway and rail safety mandates. *See* 23 U.S.C. §§ 130(d), 152(a), 402(a); 45 U.S.C. § 433; 23 C.F.R. Parts 646, 924. Arizona participates in these programs and has specifically delegated rail crossing safety authority to the Corporation Commission. *See* A.R.S. §§ 40-337 to 337.03. The parties in this special action do not disagree that the information sought was related to a federal safety program.

The key to determining the scope of the section 406 privilege is Congress' decision to protect "data." The ordinary meaning of "data" is "facts." When the data has been "compiled," to use the statutory term, it is protected both against discovery and against admission into evidence.

The real parties in interest assert that "data" does not means facts or raw data, but only means the written documents into which the data has been incorporated. That contention contradicts the plain language used by Congress. As the real parties in interest conceded at oral argument, "We're not reading the statute as it's written."

Any other interpretation would render the statutory privilege illusory. Physical documents which contained data would be protected, but the data itself would not. Any other meaning would also undercut the statutory

purpose. Congress apparently intended to protect the process of making rail crossing safety decisions from outside scrutiny and interference.[2] With countless miles of rail lines and highways throughout the United States but only finite resources, improving safety is necessarily an ongoing process. Not every safety measure can be adopted at every rail crossing with a snap of the fingers. Congress thought that decisions seeking to optimize the proper balance between safety and fiscal restraints would be best produced in a system free from intrusive second-guessing by civil tort actions, a system in which candid evaluations of highway safety hazards would flourish and information-gathering would be uninhibited. *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (evaluations); *Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d 794, 802 (Ohio Ct. App. 1989) (information); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So.2d 1069, 1074 (Miss. 1992) (information).

The clear weight of authority holds that data as well as documents are protected by the statute. In *Robertson v. Union Pac.*, the court upheld the exclusion[3] of rail crossing safety data, of a newspaper article based on such data, and of expert opinion testimony based on such data. The court held that introduction of data compiled for the purpose of highway and rail crossing safety enhancement was barred by "[t]he plain language of the statute." 954 F.2d at 1435. Moreover, the statute also bars secondary sources—such as the newspaper article—because " '[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the

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[2] Although the legislative history of section 409 is silent as to Congressional purpose, the courts have ascribed this purpose to Congress. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 156 n. 3 (7th Cir. 1992).

[3] The evidence was excluded from trial. Discoverability of the information was not at issue because 23 U.S.C. § 409 apparently had not yet been amended to clarify that the data is also not discoverable.

statute.'" *Id.* (quoting district court). In short, both the documents containing data and the data itself are protected.

The superior court nevertheless rejected *Robertson* as authority because "it is not controlling on Ninth Circuit state trial courts." While *Robertson* is not "controlling" in a strict sense, it is powerfully persuasive. That decision is one of only two United States Court of Appeals decisions on point. The other decision is consistent with *Robertson*: It holds that a witness cannot testify about the contents of documents otherwise protected by the statute, because to allow such testimony "would have circumvented the purpose of the statute." *Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992).[4] It is of little consequence that these are decisions of the Seventh and Eighth Circuits of the Court of Appeals rather than of the Ninth Circuit. None of these courts has the power to directly review any decisions by Arizona state courts. Thus, none of them can issue "controlling" decisions, at least in the strict sense. No juridical reason warrants rejection of other circuits' opinion simply because the Ninth has not yet spoken.[5] Thus, we are left with two consistent opinions from the penultimate federal court in the land interpreting a federal statute. In our view, this comprises such weighty authority on a federal question that we would be extremely reluctant to disagree with it.[6]

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[4] The superior court did not cite *Harrison* and was apparently unaware of it.

[5] A different problem would be presented if the Ninth Circuit were to have issued an opinion contrary to other circuits. In such a situation, the weight of authority might conceivably be rejected in the interest of uniformity of law between state and federal courts within the circuit. However, the Ninth Circuit has not opined contrary to *Robertson* and *Harrison*.

[6] The superior court also relied on a district court opinion, *Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990). To the extent it conflicts with *Robertson*, *Hagerty* has been im-

State court decisions are largely consistent with the two federal appellate decisions: The states also interpret the federal privilege expansively. *In Perkins v. Ohio Dep't of Transportation*, for example, the court held that data —"evidence of any accidents which came to the attention of defendant solely as a result of its programs operated pursuant to a federal . . . program"—was inadmissible. 584 N.E.2d at 802. In *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So.2d at 1073, the court rejected as "specious" a "literalistic reading of the statute, to exclude the actual documents, but allow witnesses to testify to their contents." *See also Claspill v. Missouri Pacific R.R. Co.*, 793 S.W.2d 139 (Mo. 1990) (upholding exclusion of testimony, but not expressly interpreting scope of federal privilege statute).

A single state case, upon which the real parties in interest heavily rely, does not overcome the weight of federal and state authority. In *Martinolich v. Southern Pac. Transp. Co.*, 532 So.2d 435 (La. Ct. App. 1988), the court held that the language of the pre-amendment version of section 409 should be read narrowly as preventing only the admission of evidence at trial and not as barring the pretrial discovery of information. The Congressional amendment clarifying that the privilege indeed does bar discovery erased this misconception, and with it the vitality of *Martinolich*.

The real parties in interest nevertheless urge us to restrain the scope of the federal privilege and subject to discovery data developed after the Corporation Commission issued its order authorizing the improvement of this crossing. We find no authority for this proposition and, in view of the broad Congressional language, we are disinclined to restrict the privilege. Moreover, the Congressional purpose is best served by protecting such data.

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plicitly overruled: the federal district court that issued the *Hagerty* opinion is within the Eighth Ciircuit, and, unlike a state court, is subject to direct review by the circuit court of appeals.

As the real parties in interest acknowledged at oral argument, the Corporation Commission's order to improve this crossing did not designate when improvement was to begin: It stated that the improvement was to be made when the railroad had the available resources. Thus, decisions concerning the installation of the gates were not complete when the commission issued its order. Therefore, the release of information about this particular crossing compiled after the commission's order would still subject the decision making process to scrutiny. In addition, disclosure of information about other crossings generated after the commission issued its order would expose the process to the harsh glare of hindsight. Congress apparently intended to prevent precisely this kind of intrusion.

The real parties in interest also contend that the data is discoverable because it might have been gathered for purposes other than federal safety programs. The record fails to reveal that the data was gathered for other purposes. More importantly, that fact would be immaterial even if it could be proved: The federal statutory language and purpose would still require that the data be privileged. In *Robertson v. Union Pac.*, 954 F.2d at 1435 n.3, the court held just such an argument to be "without merit."

The real parties in interest next argue that the statute does not protect data produced prior to the effective date of the 1991 amendment. Prior to that date, they contend, the statute barred admission of the data into evidence at trial but not its pretrial discovery. *See Martinolich*, 532 So.2d at 439.

We reject this contention first because Congress intended all along to protect the data from discovery. The earlier version of the statute barred not only the admission of the data into evidence, but also its consideration "for other purposes." In our opinion, *Martinolich* misinterpreted the statute; the Congressional amendment clarified that the provision already extended the privilege to

discovery materials rather than altering the privilege by expanding its scope.

Secondly, even if the 1991 amendment extended the scope of the statute, the amendment was retroactive. Federal law considers procedural amendments such as this one to be presumptively retroactive. *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). Thus, no matter when the data originated, the 1991 amendment barred its discovery at any time after the effective date of that amendment. *See Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d at 803; *Claspill v. Missouri Pac. R. Co.*, 793 S.W.2d at 140 (23 U.S.C. section 409 is retroactive). There is no dispute that the 1991 version was in effect at the time the discovery requests were made in this case. Thus, the statute barred the requested discovery.

The final argument advanced by the real parties in interest is that application of the federal statute to state court actions violates the Tenth Amendment to the United States Constitution, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The protection of the Tenth Amendment is limited to preserving the rights of the states to participate in the national political process; otherwise, the states must rely on that process to preserve their roles and powers. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). The enactment by Congress of a federal evidentiary and discovery privilege in state court actions for a permissible federal purpose does not deprive the State of Arizona of its ability to participate in the national political process and thus does not run afoul of the Tenth Amendment. *See Claspill v. Missouri Pac. R.R. Co.*, 793 S.W.2d at 140-41 (rejecting Tenth Amendment argument).

The respondent court and judge committed a clear abuse of discretion by failing to follow federal law and by directing the railroad to produce in discovery information that is protected by federal law. Accordingly, we have accepted jurisdiction and granted the relief sought by the railroad.

/s/ Jefferson L. Lankford
JEFFERSON L. LANKFORD
Judge

CONCURRING:

/s/ Edward C. Voss
EDWARD C. VOSS
Presiding Judge

/s/ Rudolph J. Gerber
RUDOLPH J. GERBER
Judge

APPENDIX F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

December 3, 1992

HON. MICHAEL A. YARNELL

No. CV 91-19192

MARY ISBELL

v.

SOUTHERN PACIFIC TRANSPORTATION CO., *et al.*

MINUTE ENTRY

Defendant State's Motion for Protective Order and Plaintiff's Cross-Motion to Compel Discovery From Defendants have been under advisement.

On April 10, 1990 Richard Isbell was driving a milk truck westbound on Chandler Heights Road just east of Arizona Avenue. In crossing the railroad tracks at that location his truck was struck by a northbound Southern Pacific train. Mr. Isbell was killed in the accident.

Plaintiff asserts Defendants were negligent in several particulars, including:

1. Maintaining an unreasonably dangerous crossing;
2. Allowing an unreasonable delay in installing approved or ordered crossing control devices;

3. Failure to properly sign the crossing;

4. Failure of the train to properly slow down;

5. Inadequacy of warning horn and lights; and

6. Maintaining an obstructed view of the crossing.

Plaintiff seeks additional discovery from Southern Pacific concerning the reasons for, explanation of, an apparent four year delay after the State approved or ordered an upgrading in the crossing control devices. Plaintiff seeks additional discovery from the State concerning all other ordered crossing upgrades and delays state-wide in the relevant time period.

Plaintiff seeks discovery as to whether or not the State did or could have ordered Southern Pacific to upgrade the crossing. Finally, plaintiff seeks discovery concerning the construction of the upgraded crossing in this case, including the identity of the crews who did the work.

Defendants resist this discovery on the basis of 23 U.S.C. § 409 as amended December 18, 1991. That section is titled "Discovery and admission as evidence of certain reports and surveys" and reads as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The 1991 amendment changed this statute only by adding the words "Discovery and" to the title and the highlighted words "subject to discovery or" to the text.

Defendants contend that this statute prohibits disclosure of all of the information sought by Plaintiffs, even that which is otherwise public.[1] Plaintiff contends that the statute protects only reports, conclusions in reports, and the like, not any underlying data. Plaintiff also contends that protected reports are only those relating to this particular crossing, not any other crossing in Arizona.

In addition, Plaintiff contends that if the statute does prevent disclosure of the underlying facts sought, protection of the statute has been waived by defendants, the statute is unconstitutional, and the statute should be given only prospective application. As to these issues, based on the memoranda and this entire record, the Court concludes that no waiver as to any not yet disclosed material has occurred,[2] that the statute is constitutional, and that the statute is not limited to prospective application.

On the merits, this Court concludes that *only* those things not admissible under the prior statute are now not discoverable. If read as broadly as possible, the statute would exclude virtually any "data" collected by the State or the railroad that might be used on any current or future project that might be constructed for safety purposes and might use some federal money. Such a broad reading is not warranted by the case law, the common meaning of the words used, common sense, or apparent congressional intent.

After review of the cited cases, it is this Court's conclusion that while the actual "reports, surveys, schedules,

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[1] Defendants' contentions concerning federal preemption of some or all of Plaintiff's claims, while here raised by defendants, are not fully briefed and will not be dealt with by the court on this discovery motion.

[2] At least as to discovery, waiver has occurred as to all previously disclosed information.

lists, or data" compilations (or calculations) prepared expressly for "the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings" are neither discoverable nor admissible, simple factual information gathered for or contained in such reports or compilations is discoverable and is admissible *if* otherwise relevant and probative. *See Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990), *Martinolich v. Southern Pacific Trans. Co.*, 532 So.2d 435, 439 (La. App. 1 Cir. 1988). An otherwise discoverable or admissible fact is not made non-discoverable or non-admissible simply by its inclusion in a privileged document or conversation.[3]

In the context of this action Plaintiff may discover reasonably available factual information (as opposed to reports, opinions and conclusions excluded by the statute) concerning the specifics of the delay in upgrading the crossing at issue here and may discover reasonably available factual information (as opposed to reports, opinions and conclusions excluded by the statute) concerning other crossings during relevant periods. For the purposes of discovery in this action, the relevant period is from December 3, 1983 through the time the upgrade of the crossing at issue here was actually completed.

Should defendants have to expend more than minimal time to provide this information, Plaintiff must pay a reasonable hourly rate for all labor and copying involved.

IT IS ORDERED granting Plaintiff's Cross-motion to Compel Discovery From Defendants.

FURTHER ORDERED denying Defendant State's Motion for Protective Order.

FURTHER ORDERED Defendant State shall answer Plaintiff's Non-Uniform Interrogatories and respond to

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[3] To the extent *Robertson v. Union Pac. R. R. Co.*, 954 F.2d 1433 (8th Cir. 1992) holds otherwise, it is not controlling on Ninth Circuit state trial courts.

Plaintiff's Third Request For Production of Documents, except only as expressly limited by this minute entry, on or before *January 8, 1993.*

FURTHER ORDERED Defendant Southern Pacific shall provide answers to Plaintiff's Non-Uniform Interrogatories (First Set) together with Plaintiff's Non-Uniform Interrogatories (3rd Set) and respond to Plaintiff's Third Request For Production of Documents to Southern Pacific, except only as expressly limited by this minute entry, on or before *January 8, 1993.*

FURTHER ORDERED no award of attorneys' fees or costs concerning these discovery related motions is made.

FURTHER ORDERED setting a Continued Comprehensive Pretrial Conference for the purpose of considering the parties' Proposed Joint Pre-Trial Order and to set a firm trial date for *January 28, 1993 at 8:30 a.m.*